IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.608 OF 1990

Sanghvi Swiss Refills Private Ltd.,)
18, Subhash Road, Vile Parle East,)
Bombay-400 057)..Petitioner

Versus

1.Smt. Arti Handa, Assistant)
Commissioner of Income Tax,)
Central Circle XIX, Bombay having)
her office at Old C.G.O. Building,)
Maharshi Karve Road, Bombay.)
)
2.The Union of India)..Respondents

Mr. Arun Sathe, Senior Counsel with Mr. Mandar Vaidya and
Mr. Rajesh Shah i/b. Rajesh Shah & Co., for the Petitioner
Mr. S.M. Shah for Respondents.

CORAM : F.I. REBELLO &
J.P. DEVADHAR, JJ.

DATED : 23RD OCTOBER 2007

JUDGMENT (PER F.I. REBELLO, J.)

. Petitioners have challenged the notice dated 30th

March, 1989 issued by the respondent No.1 under Section 148 of the Income Tax Act, 1961, seeking to reopen the petitioner's assessment for the assessment year 1984-85, for which the relevant previous year is year ended 30th June, 1983. Search operations were carried out on 27th September, 1988 at the business and residential premises amongst others of the petitioners. Assessment for the assessment years 1972-73 to 1984-85 was sought to be reopened. Petitioners challenged the assessment for some of the years by separate petition being Writ Petition No.1374 of 1989. Petitions had been admitted and interim relief had been granted. Subsequently those petitions have been allowed in favour of the petitioner by order dated 22nd August, 2005.

2. The petitioner is in the business of manufacturing of ball pens and refills as also ink. In far as manufacture of ink is concerned the process involves mixing various chemicals and dyes, heating and otherwise processing the said mixture of ink chemicals and dyes. According to the petitioner by the very nature of the process, one unit of raw material cannot produce one unit of ink and hence considerable wastage occurs in the manufacture of ink itself. As far as ink refills are concerned, there is no uniform rate of consumption for any year. The amount of ink utilised depends upon the type and size of refills and pens produced, some of which contain a larger quantity of ink than others. Further consumption of ink chemicals will vary in accordance with the amounts of ink the petitioner has

produced either for internal use or for possible resale. The petitioner's audited annual accounts include disclosure of the consumption of all raw materials during the year including ink/ink chemicals. It is the case of the petitioner that at the time of completing the assessment for the assessment year 1984-85, the 1st respondent was aware of the possible conclusions that could be reached in relation to the consumption of raw materials and production of finished goods for the assessment year 1975-76 and 1976-77 which were completed prior to assessment year for which the current petition is filed. The 1st respondent on identical material placed before him had accepted the accounts as disclosed in the petitioner's books of account. Similarly for the assessment year 1977-78 had similarly accepted the results as disclosed but had passed an order on different ground. Although these findings were subsequently reversed by the Appellate authorities, the 1st respondent was aware and seized of the question of the shortcomings, if any, in the petitioner's income as declared by reason of the alleged excess production/consumption of finished goods/ raw materials. The notice issued under Section 148 of the Income Tax Act is being challenged on the following grounds:-

(a). The reasons recorded do not mention that there is a failure on the part of the petitioner, to disclose truly and fully all material facts.

(b). The assessment cannot be reopened merely on the basis of estimation based on statement under section 132(4) of the Income Tax Act, when all primary facts have been fully disclosed, while filing the original return.

(c). The reopening of the assessment cannot be done on mere suspicion. There must be "reason to believe" based on the material found during the course of search.

(d). The conditions precedent to reopening that there is a failure on part of the assessee to disclose truly all material facts necessary for assessment and that there is escapement of income, are absent.

3. In reply to the petition, an affidavit was earlier filed by Anthony Lawrence Arokiadas. It was set out that based on the statements of Directors/partners who were examined under Section 132(4) and from the manufacturing process during the search, it was found that on an average 20 gross refills with x-10 tips were produced out of 1 kg. of ball pen ink and 18 gross eiko sharp long refills are produced out of 1 kg. of ball pen ink. Also 80 dozens of jotter refills are produced out of 1 kg. of ball pen ink. The data that had come to light on account of the information based on statements was then set out. It is, therefore, contended that for those reasons the petition filed should be dismissed and/or at any rate the petition was premature. In the additional affidavit of P.C. Maurya,

the statement of Shri Dwarkadas J. Sanghvi and others recorded in the course of search and seizure have been annexed.

4. In the reasons for reopening the assessment under Section 147 in case of the petitioner for the assessment year 1984-85 at paras.4 and 6 it is set out as under:-

> "4. The one fact that came out during the recording of statements u/s.132(4) was that there is a definite ratio between the consumption of ink and the number of refills produced. One kg. of ink is required for producing 20 gross of eko refills. Consumption of ink is higher for producing sharp refills. The assessee is manufacturing eko refills and sharp refills (larger size). On consumption of 1 kg. of ink 18 gross sharp refills can be produced.
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> 6. In view of the above, I have reason to believe that by reason of failure on the part of the assessee to disclose the income from sale of suppressed production, income to the extent of Rs.44,53,680/- has escaped assessment within the meaning of Section 147(a) of the I.T. Act, 1961."

5. The petitioners filed have an additional affidavit of Jayant Sanghvi, Director dated 7th July, 2006 in rejoinder. It is specifically set out therein that the statements

annexed to the affidavit dated 26th September, 205 have not been correctly produced ad verbatim and only the gist of those statements have been produced. In the original statement it is contended that it has been specifically stated by the affiant that on consumption of 1 kg. of ink 16 to 20 gross refills can be produced depending on the size and type of the refill. It is pointed out that the assessing officer for the assessment year 1986-87 based on the statement of the affiant taking maximum figure of 20 gross per kg. has made the additions. The Commissioner of Income Tax (Appeals) deleted the addition made by A.O. relying on Chartered Engineer's Certificate which state that while manufacturing ink from ink chemicals the wastage is to the extent of 3-4% and while putting the ink in refills wastage is to the extent of 10.7%. The order of the Commissioner of Income Tax (Appeals) was confirmed by the Tribunal. No appeal has been filed against the said order.

. Another relevant fact to be considered is that in the statement recorded under Section 132(4) Shri Dwarkadas J. Sanghvi had offered that income of Rs.5.00 lakhs in so far as the petitioner company is concerned. This income was offered for the assessment year 1989-90. The Assessment Officer in his assessment order has accepted the same.

6. With the above background the question that would arise is whether the reasons given would constitute reasons to believe warranting the exercise of jurisdiction in

issuing notice under Section 148 of the I.T. Act. Section 147(a), as it then stood required that if the Assessing Officer has reason to believe that by reason of omission or failure on the part of the assessee to make return under Section 139 for any assessment year to the Assessing Officer or to disclose fully and truly all material facts necessary for assessment, income chargeable to tax has escaped assessment the Officer subject to the other provisions could assess or reassess. There has been no omission or failure for the Assessing Officer to have reason to believe that the income chargeable to taxhas escaped assessment for any assessment year. In other words before issuing the notice under Section 148 considering the statutory requirements of Section 147 the Assessing Officer must have reason to believe. The question is whether the reasons as disclosed would constitute 'reason to believe' warranting exercise of jurisdiction under Section 147 of the Income Tax Act and consequently to issue the notice under Section 148 of the I.T. Act recording the reasons.

5. We may first deal with the contention raised on behalf of the respondent that the petition was premature. Reliance was placed on the judgment in **G.K.N.Driveshafts (India) Ltd. vs. Income-tax Officer & Ors.,** 259 ITR 19. In that case pursuant to a notice under Section 148 the Appellant therein filed returns. The Appellant also received notice under Section 143(2) calling for further information on certain points in connection with the

returns. The Appellant therein challenged the notice by petition filed under Article 226 of the Constitution. That petition was dismissed as being premature. The Supreme Court in the Appeal preferred dismissed the Appeal observing that since the reasons for reopening the reassessment under Section 148 had been disclosed, the Assessing Officer had to dispose of the objections, if filed, by passing a speaking order.

. In **Income-tax Officer, I Ward, Dist. VI, Calcutta & Ors., vs. Lakshmani Mewal Das, 103 ITR 437 (S.C.)** the petition was filed challenging the notice issued under Section 148 of the Income Tax Act. The petitions were allowed, against which Appeals were preferred. The Appeals were dismissed. What is relevant to notice is that the High Court took the view that the condition precedent to issue notice under Section 148 were not fulfilled. In Appeal the Supreme Court was pleased to observe that reasons for the formation of the belief for reopening of the assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. The Court would not go into the sufficiency or adequacy of the material and substitute its

own opinion for that of the Income-tax Officer on the point as to whether action should be initiated for reopening the assessment. The Court, however, noted that at the same time that it is not any and every material, however, vague and indefinite or direct, remote and far-fetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The Court then held that the reason for the formation of the belief must be held in good faith and should not be a mere pretence.

6. In the instant case we have earlier reproduced the reasons which constituted the formation of belief. The learned Counsel took us to the statement recorded. Nowhere in the statement recorded is there any unequivocal admission by the Directors of the petitioners for the ratio worked out for consumption of raw materials. In one statement it was 18 to 20 gross per 1 kg. In another statement it was 16 to 20 per 1 kg. Our attention was also invited to the balance sheet and the schedule thereto which show that for the year 1982-83 the production of ink was 3695 kg. and the ink sold for that year was 3695 kg. Therefore, from the raw materials of ink and ink chemicals, 3695 kg. of ink were produced and sold and the balance was used in ball pen refills. In the petition the petitioner brought on record that there are also wastages which statement has not been denied. In fact for the assessment year 1986-87 the Commissioner of Income Tax (Appeals) accepted based upon the

report of the Chartered Certificate that while manufacturing ink, the ink waste is 3% to 4% and while putting the ink in refills the waste is to the extent of 10.7%. The ink which was used as raw material, that information was already available to the Assessing Officer and was not new information. The Assessing Officer considering the raw material consumed for the purpose of refilling has taken the maximum figures and on that basis only, held that there were reasons to believe the failure of the assessee to disclose the true income and to that income has escaped assessment.

7. In our opinion firstly the material was already available. Secondly, the Assessing Officer has merely proceeded on surmises and conjectures. Thirdly, the Assessing Officer has not taken into consideration that out of the raw materials ink had been produced and also has not taken into consideration the waste in production of ink as also in filling of the refills. In our opinion, therefore, it cannot be said that there were reasons to believe warranting assumption of jurisdiction and issuing notice under Section 148 of the I.T. Act.

8. There is yet another reason as to why this Court ought to exercise its extra ordinary jurisdiction. In the statement recorded under Section 243(4) Shri Sanghvi had offered income to the extent of Rs.5.00 lakhs. That income thereafter was offered for the assessment year 1989-90 which has been accepted. The income was so offered for the

reasons set out in the statement which we need not reproduce. Yet another circumstance is that based on the statements recorded under Section 134(4) there was reopening of assessment for various other years. The petitioners have pointed out that for the assessment year 1986-87 against the order of the A.O. they had preferred an Appeal in the matter of additions made based on the statement under Section 134(4). That appeal was allowed. The ITAT dismissed the Appeal preferred by the Revenue. In other words the findings arrived at by the Commissioner (Appeals) stood confirmed. That has not been challenged. There were, therefore, no reasons to believe warranting notice under Section 148 of the I.T. Act. At the stage of admission interim relief was granted and is continued ever since then.

9. For all the aforesaid reasons we make Rule absolute, in terms of of prayer clauses (a) and (c). In the circumstances of the case there shall be no order as to costs.

(J.P. DEVADHAR, J.) **(F.I. REBELLO, J)**